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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 UNITED STATES OF AMERICA,
15 Plaintiff,
16 v.
17 JOHN WOLFENBARGER
18 Defendant.

CASE NO. CR 16-519- LHK

**DEFENDANT'S PROPOSED FINAL
JURY INSTRUCTIONS**

Status Hearing: June 30, 2021
Trial Date: August 6, 2021

Honorable Lucy H. Koh

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21 Defendant John Wolfenbarger, by and through his counsel, submits the following proposed
22 Final Jury Instructions. Pursuant to Federal Rule of Criminal Procedure 30, Mr. Wolfenbarger
23 requests the Court to instruct the jury on the law as set forth below. Mr. Wolfenbarger reserves
24 the right to submit any limiting instructions, based upon the Court's evidentiary rulings at the
25 pretrial conference or at trial.

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1 Mr. Wolfenbarger also reserves the right to submit any additional proposed instructions,
2 including his theory of the defense instructions, at the close of evidence.

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4 Dated: July 15, 2021

Respectfully submitted,

5 GEOFFREY HANSEN
6 Acting Federal Public Defender

7 _____/S
8 SEVERA KEITH
9 GRAHAM ARCHER
Assistant Federal Public Defender

INTRODUCTION

Mr. Wolfenbarger requests that the indictment not be sent to the jury room. *See* Ninth Circuit Jury Procedure Manual, § 4.6 (“the Committee believes that great caution should be exercised in providing the jury with the indictment since it is frequently cast in highly prejudicial language.”) (“The trial judge has wide discretion as to whether the jury should be provided with a copy of the indictment for use during jury deliberations.”)

The defense joins in the Government’s requests for the following Model Jury Instructions:

- 3.1 Duties of Jury to Find Facts and Follow Law
- 3.5 Reasonable Doubt—Defined
- 3.6 What Is Evidence
- 3.7 What Is Not Evidence
- 3.8 Direct and Circumstantial Evidence
- 3.9 Credibility of Witnesses
- 3.10 Activities Not Charged
- 3.11 Separate Consideration of Multiple Counts
- 3:18 On or About Defined
- 4.1 Statements by Defendant (if applicable)
- 4.3 Other Crimes, Wrongs or Acts of Defendant (if applicable)
- 4.4 Character of Defendant (if applicable)
- 4.8 Impeachment Evidence - Witness
- 4.14 Opinion Evidence, Expert Witness (if applicable)
- 4.16 Charts and Summaries Not Received in Evidence
- 4.17 Charts and Summaries in Evidence
- 5.7 Knowingly
- 7.2 Consideration of Evidence
- 7.3 Use of Notes
- 7.4 Jury Consideration of Punishment

7.5 Verdict Form

7.6 Communication with Court.

The defense objects to any *non-structural* note sent by the jury being read to counsel during trial, before deliberations. Specifically, the defense will object to any questions during trial asking for factual clarification or further elaboration on any factual issue. The defense has no objection to jury notes during the trial, and before deliberations, relating to the structure of the trial and jury – such as a sleeping juror, or attorney contact with a juror. The defense also has no objection to counsel being made aware of jury notes *during deliberations*.

7.13 Post-Discharge Instruction

Mr. Wolfenbarger additionally requests the following Ninth Circuit Model Instructions (2010 edition, last updated 12/2020) and additional Proposed Instructions at the conclusion of the trial. Mr. Wolfenbarger will propose his theory of defense instructions at the conclusion of evidence. He reserves the right to propose additional instructions at that time.

DEFENSE ADDITIONAL PROPOSED INSTRUCTIONS

Model
Instruction
No.

3.2 Charge Against Defendant Not Evidence--Presumption of Innocence--
Burden of Proof (2010 edition, 12/2020 update)

3.3 Defendant's Decision Not to Testify (modified, Proposed Instruction 3)

3.4 Defendant's Decision to Testify (modified, Proposed Instruction 4)

3.15 Possession - Defined

4.15 Dual Role Testimony (if applicable)

7.1 Duty to Deliberate

8.182A Sexual Exploitation of Child-Transportation of Visual Depiction Into
United States (modified, Proposed Instruction 5)¹

8.144 Sexual Exploitation of Child—Transportation of Child Pornography
(modified, Proposed Instruction 6)

8.192A Using or Attempting to Use the Mail or a Means of Interstate Commerce
to Persuade or Coerce a Minor to Travel to Engage in Prostitution or
Sexual Activity (modified, Proposed Instruction 7)²

Proposed Instruction 8, Attempted Coercion and Enticement, 18 U.S.C. § 2242(b)

Proposed Instruction 9, Sexual Exploitation Of Child - Receipt of Child
Pornography - 18 U.S.C. § 2252(a)(2)

Proposed Instruction 10, Interstate Commerce Defined

Proposed Instruction 11, Producing – Defined

Proposed Instruction 12, Transported – Defined

Proposed Instruction 13, Visual Depiction – Defined

Proposed Instruction 14, Minor – Defined

Proposed Instruction 15, Sexually Explicit Conduct – Defined

¹ Title modified in Model Instruction to: “Attempted Production of Child Pornography”

² The title of this instruction should be modified to: “Attempted Coercion and Enticement of Minors.”

DEFENSE PROPOSED INSTRUCTIONS

MODEL INSTRUCTION 3.2

Charge Against Defendant Not Evidence--Presumption of Innocence--Burden of Proof

The indictment is not evidence. The defendant has pleaded not guilty to the charges. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence. The defendant does not have to prove innocence; the government has the burden of proving every element of the charge[s] beyond a reasonable doubt.

Argument: The defense requests that this newest version of this Instruction be given to the Jury. The government proposes an earlier version of this instruction.

Authority: NINTH CIRCUIT MODEL JURY INSTRUCTION, 3.2 (2010 edition, 12/2020 update)

Given ____

Rejected ____

Given, As Modified _____

MODEL INSTRUCTION 3.3 (modified)

DEFENSE PROPOSED INSTRUCTION NO. 3

Defendant's Choice Not to Testify or Present Evidence

The defendant did not testify (or present evidence) in this case. In a criminal case, a defendant has a constitutional right not to testify or to present any evidence. The burden of proof remains with the government throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent. You must not attach any significance to the fact that the defendant did not testify. You must not draw any adverse inference against him because he did not take the witness stand. Do not consider, for any reason at all, the fact that he did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

Argument: These modification are supported by the law cited below.

Authority: *United States v. Castaneda*, 94 F.3d 592, 596 (9th Cir. 1996); *Carter v. Kentucky*, 450 U.S. 288 (1981); *Shults v. Whitley*, 982 F.2d 361 (9th Cir. 1992);

NINTH CIRCUIT MODEL JURY INSTRUCTION, 3.3 (2010) (MODIFIED)

Given _____

Rejected ____

Given, As Modified _____

1 **DEFENSE PROPOSED INSTRUCTION NO. 4**

2 **MODEL INSTRUCTION 3.4 (modified)**

3 **Defendant's Testimony**

4 The defendant has testified. You should treat his testimony just as you would the testimony
5 of any other witness. You should not disregard or disbelieve his testimony simply because he is
6 charged as a defendant in this case.

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23 Authority: NINTH CIRCUIT MODEL JURY INSTRUCTION, 3.4 (2010) (modified)

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25 *Given* ____

26 *Rejected* ____

27 *Given, As Modified* ____

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2 **MODEL INSTRUCTION 3.15**

3 **Possession—Defined**

4 A person has possession of something if the person knows of its presence and has physical
5 control of it, or knows of its presence and has the power and intention to control it.
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22 Authority: NINTH CIRCUIT MODEL JURY INSTRUCTION, 3.15 (2010 edition, 12/2020
23 update)
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25 *Given* ____

26 *Rejected* ____

27 *Given, As Modified* _____
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MODEL INSTRUCTION 4.15

Dual Role Testimony

You have heard testimony from [name] who testified to both facts and opinions and the reasons for her or his opinions.

Fact testimony is based on what the witness saw, heard or did. Opinion testimony is based on the education or experience of the witness.

As to the testimony about facts, it is your job to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Take into account the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of witnesses.

As to the testimony about the witness's opinions, this opinion testimony is allowed because of the education or experience of this witness. Opinion testimony should be judged like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Authority: NINTH CIRCUIT MODEL JURY INSTRUCTION, 4.15 (2010 edition, 12/2020 update)

Given ____

Rejected ____

Given, As Modified _____

MODEL INSTRUCTION 7.1**Duty to Deliberate**

When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Perform these duties fairly and impartially. Do not allow personal likes or dislikes, sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong.

Argument: The defense requests that the jury receives this instruction with the same paragraph structure as in the Model Rules.

Authority: NINTH CIRCUIT MODEL JURY INSTRUCTION, 7.1 (2010 edition, 12/2020 update)

Given ____

Rejected ____

Given, As Modified _____

DEFENSE PROPOSED INSTRUCTION NO. 5

Attempted Production of Child Pornography– 18 U.S.C. §§ 2251(c) and (e)

The defendant is charged in Count One the indictment with attempted production of child pornography, in violation of Section 2251(c) and (e) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally employed, used, persuaded, induced, enticed, and coerced the [name of child] to engage in sexually explicit conduct outside of the United States, its territories, or possessions, for the purpose of producing a visual depiction of such conduct.

Second, at the time, the [name of child] was under the age of eighteen years.

Third, the defendant intended that the visual depiction would be mailed or transported into the United States, its territories, or possessions by any means, including by using any means or facility of interstate commerce or mail.

Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances

A minor means any person under the age of 18 years.

Authority: "Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2). "Producing" is defined in 18 U.S.C. § 2256(3). "Visual depiction" is defined in 18 U.S.C. § 2256(5).

NINTH CIRCUIT MODEL JURY INSTRUCTION, 8.182A (2010) (MODIFIED)

Given ____

Rejected ____

Given, As Modified ____

DEFENSE PROPOSED INSTRUCTION NO. 6**Count One - Intent Required**

To obtain a conviction on Count One, the government must prove that the defendant intended to produce and transport a visual depiction of a minor engaged in sexually explicit conduct to the United States.

A person acts with a specific intent if he acts with the intent that his action causes a certain result.

Intent to transmit a live visual depiction does not constitute intent to transport a visual depiction.

Argument and Authority:

Compare 18 U.S.C. § 2251(a) (listing separate offenses of “producing any visual depiction” and “transmitting a live visual depiction”) with 18 U.S.C. § 2251(c) (listing only offense of “producing any visual depiction”); see Pub.L. 110-401, Title III, §§ 301, 302 (amending 18 U.S.C. § 2251(a) and (b) to insert “or for the purpose of transmitting a live visual depiction of such conduct” and to insert “or transmitted,” but making no similar amendment to 18 U.S.C. § 2251(c)); *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015) (finding evidence insufficient to support conviction under 18 U.S.C. § 2251(a), where defendant was convicted of knowingly employing, using, persuading, inducing, enticing, or coercing a minor in sexually explicit conduct, for the purpose of producing a visual depiction of that conduct, and “the evidence produced at trial does not support the conclusion that Palomino-Coronado engaged in sexual activity with B.H. for the purpose of producing a picture”); *United States v. Kokayi*, 2019 WL 2997384, *3 (E.D. Va. 2019) (distinguishing *Palomino-Coronado* where defendant was found guilty of transmitting live visual depiction, which is the “second prong” of § 2251(a), and “which was not at issue in *Palomino-Coronado*”).

Given ____

Rejected ____

Given, As Modified ____

DEFENSE PROPOSED INSTRUCTION NO. 7**Count One - Purpose Required**

To obtain a conviction on Count One, the government must prove that the defendant acted for the purpose of producing a visual depiction of sexually explicit conduct outside the United States.

A person acts with a specific purpose if he acts with the intent that his action causes a certain result.

Acting for the purpose of transmitting a live visual depiction does not constitute acting for the purpose of producing a visual depiction.

Authority: Compare 18 U.S.C. § 2251(a) (listing separate offenses of “producing any visual depiction” and “transmitting a live visual depiction”) with 18 U.S.C. § 2251(c) (listing only offense of “producing any visual depiction”); see Pub.L. 110-401, Title III, §§ 301, 302 (amending 18 U.S.C. § 2251(a) and (b) to insert “or for the purpose of transmitting a live visual depiction of such conduct” and to insert “or transmitted,” but making no similar amendment to 18 U.S.C. § 2251(c)); *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015) (finding evidence insufficient to support conviction under 18 U.S.C. § 2251(a), where defendant was convicted of knowingly employing, using, persuading, inducing, enticing, or coercing a minor in sexually explicit conduct, for the purpose of producing a visual depiction of that conduct, and “the evidence produced at trial does not support the conclusion that Palomino-Coronado engaged in sexual activity with B.H. for the purpose of producing a picture”); *United States v. Kokayi*, 2019 WL 2997384, *3 (E.D. Va. 2019) (distinguishing *Palomino-Coronado* where defendant was found guilty of transmitting live visual depiction, which is the “second prong” of § 2251(a), and “which was not at issue in *Palomino-Coronado*”).

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Rejected ____

Given, As Modified ____

1 **DEFENSE PROPOSED INSTRUCTION NO. 8**

2 **Attempted Coercion and Enticement - 18 U.S.C. § 2242(b)**

3 The defendant is charged in Count Two of the indictment with Coercion and Enticement of
4 a Minor in violation of Section 2422(b) of Title 18 of the United States Code. In order for the
5 defendant to be found guilty of that charge the government must prove beyond a reasonable doubt:

6 First, that between November, 2013 and January 2014, the defendant attempted to use the
7 mail and a means or facility of interstate and foreign commerce, that is [*insert means or facility of*
8 *interstate or foreign commerce*], to knowingly persuade, induce, entice, and coerce an individual
under the age of 18 to engage in sexual activity for which someone could be charged with an
offense, that is [*insert title of sexual offense*]; and³

9 Second, the individual defendant attempted to persuade, induce, entice, and coerce and
10 individual who was under the age of 18; and

11 Third, the defendant did something that was a substantial step toward committing the
12 crime and that strongly corroborated the defendant's intent to commit the crime.

13 Mere preparation is not a substantial step toward committing the crime. To constitute a
14 substantial step, a defendant's act or actions must unequivocally demonstrate that the crime will
take place unless interrupted by independent circumstances.

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18 Authority: Exhibits A-G, Model Jury Instructions; United States v. X-Citement Video, 513 U.S.
19 64, 76 (1994); United States v. U.S. Dist. Court for Cent. Dist. of Cal., L.A. 858 F.2d 534, 538
20 (9th Cir. 1988) "Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2). "Producing" is
defined in 18 U.S.C. § 2256(3). "Visual depiction" is defined in 18 U.S.C. § 2256(5).

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22 *Given* ____

23 *Rejected* ____

24 *Given, As Modified* ____

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27 ³ The government must identify the means of interstate or foreign commerce and a specific
statute for which someone could be charged.

1 **DEFENSE PROPOSED INSTRUCTION NO. 9**

2 **Sexual Exploitation Of Child - Receipt of Child Pornography - 18 U.S.C. § 2252(a)(2)**

3 The defendant is charged in Count Three of the indictment with receiving child
4 pornography in violation of Section 2252(a)(2) of Title 18 of the United States Code. In order for
5 the defendant to be found guilty of that charge, the government must prove each of the following
elements beyond a reasonable doubt:

6 First, that the defendant knowingly received a visual depiction that had been transported in
7 interstate and foreign commerce;

8 Second, that the production of such visual depiction involved the use of a minor engaging
9 in sexually explicit conduct;

10 Third, that such visual depiction was of a minor engaged in sexually explicit conduct;

11 Fourth, that the defendant knew that such visual depiction was of sexually explicit
12 conduct; and

13 Fifth, the defendant knew that at least one of the persons engaged in sexually explicit
14 conduct in such visual depiction was a minor.

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20 Authority: Comment to Model Instruction 8.184, “Although the term ‘knowingly’ in the text of 18
21 U.S.C. § 2252(a)(1) and (2) appears only to modify the act of transportation or shipment, the
22 United States Supreme Court has held that the knowledge requirement also applies to the sexually
23 explicit nature of the material as well as the minority status of the persons depicted. *See United*
States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).”

24 *Given* ____

25 *Rejected* ____

26 *Given, As Modified* ____

1 **DEFENSE PROPOSED INSTRUCTION NO. 10**

2 **Interstate Commerce Defined**

3 The term “interstate commerce” means commerce between any State or Territory and any
4 place outside of that State or Territory.

21 21 U.S.C. § 321(b).

23 *Given* ____

24 *Rejected* ____

25 *Given, As Modified* ____

DEFENSE PROPOSED INSTRUCTION NO. 11

Producing – Defined

As used in Count One, “producing” means producing, directing, manufacturing, issuing, publishing, or advertising.

Transmitting a live visual depiction does not constitute “producing.”

Authority: 18 U.S.C. § 2256(3); *compare* 18 U.S.C. § 2251(a) (listing separate offenses of “producing any visual depiction” and “transmitting a live visual depiction”) *with* 18 U.S.C. § 2251(c) (listing only offense of “producing any visual depiction”); *see* Pub.L. 110-401, Title III, §§ 301, 302 (amending 18 U.S.C. § 2251(a) and (b) to insert “or for the purpose of transmitting a live visual depiction of such conduct” and to insert “or transmitted,” but making no similar amendment to 18 U.S.C. § 2251(c)).

Given ____

Rejected ____

Given, As Modified ____

1 **DEFENSE PROPOSED INSTRUCTION NO. 12**

2 **Transported – Defined**

3 As used in Count One, “transported” means transportation by any means, including by
4 using any means or facility of interstate or foreign commerce or mail.

5 The word “transported” does not mean transmission of a live visual depiction.

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20 *Authority:* 18 U.S.C. § 2256(3); *compare* 18 U.S.C. § 2251(a) (listing separate offenses for
depictions that were “transported” or “transmitted”) *with* 18 U.S.C. § 2251(c) (listing only
21 “transports”); *see* Pub.L. 110-401, Title III, §§ 301, 302 (amending 18 U.S.C. § 2251(a) and (b) to
insert “or for the purpose of transmitting a live visual depiction of such conduct” and to insert “or
22 transmitted,” but making no similar amendment to 18 U.S.C. § 2251(c)).

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24 *Given* ____

25 *Rejected* ____

26 *Given, As Modified* ____
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1 **DEFENSE PROPOSED INSTRUCTION NO. 13**

2 **Visual Depiction – Defined**

3 “Visual depiction” includes undeveloped film and videotape, and data stored on computer
4 disk or by electronic means which is capable of conversion into a visual image.
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21 *Authority:* 18 U.S.C. § 2251(a); 18 U.S.C. § 2251(c); 18 U.S.C. § 2256(5) (modified to delete
22 “and data which is capable of conversion into a visual image that has been transmitted by any
23 means, whether or not stored in a permanent format,” because § 2251(c) does not encompass
transmission of live visual depictions).

24 *Given* ____

25 *Rejected* ____

26 *Given, As Modified* ____
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1 **DEFENSE PROPOSED INSTRUCTION NO. 14**

2 **Minor – Defined**

3 “Minor” means any person under the age of eighteen years.

22 *Authority:* 18 U.S.C. § 2256(1).

24 *Given* ____

25 *Rejected* ____

26 *Given, As Modified* ____

1 **DEFENSE PROPOSED INSTRUCTION NO. 15**

2 **Sexually Explicit Conduct – Defined**

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4 "Sexually explicit conduct" means actual or simulated sexual intercourse, including
5 genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or
6 opposite sex; masturbation; or lascivious exhibition of the anus, genitals, or pubic area of any
7 person.
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23 *Authority:* 18 U.S.C. § 2256(2)

24 *Given* ____

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26 *Rejected* ____

27 *Given, As Modified* ____